COMMONWEALTH OF KENTUCKY
SUPREME COURT
2014-SC-000749-DG

GARRY W. NEWKIRK — APPELLANT

v.

From the Kentucky Court of Appeals
No. 2011-CA-001819

Appeal from the Jefferson Circuit Court
Indictment Nos. 11CR0462 and 11CR2576

COMMONWEALTH OF KENTUCKY — APPELLEE

**BRIEF FOR APPELLEE**
**COMMONWEALTH OF KENTUCKY**

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CERTIFICATE OF SERVICE

The Undersigned does hereby certify that copies of this brief were served upon the following named individuals by mail or delivery on January 4, 2016: Hon. Olu Stevens, Judge, Jefferson Circuit Court, Division Six, 700 West Jefferson Street, Louisville, KY 40202; Hon. Elizabeth B. McMahon, Counsel for Appellee, 200 Advocacy Plaza, 719 West Jefferson St., Louisville, KY 40202 (by email by agreement to bmcmahon@metrodefender.org); and Hon. Andy Beshear, Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, KY 40601 (by email by agreement to hjohnston@ky.gov). The undersigned does also certify that the record on appeal was not checked out in preparation of this brief.

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## STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth believes that the Court of Appeals adequately and accurately addressed the issues raised in this appeal and that with that opinion and this brief, this Court will be fully informed regarding the facts and law necessary to decide this case. Accordingly, the Commonwealth does not believe that oral argument is necessary; however, should the Court decide that oral argument will assist it in determination of this case, the Commonwealth will gladly present its position and answer the Court's questions.

## COUNTERSTATEMENT OF POINTS AND AUTHORITIES

**CONCLUSION**

## COUNTERSTATEMENT OF THE CASE

The Commonwealth largely accepts Appellant's statement of the case, but believes that it lacks critical detail about discussions at the August 15, 2011 pretrial conference, mischaracterizes Detective Kevin Lewis' summary of what he observed on the surveillance video, and omits important statements made by the parties and the trial court during discussion of Appellant's motion to exclude testimony about the contents of the surveillance video. Accordingly, the Commonwealth offers the following additional facts.

At a pretrial hearing on August 15, 2011, Appellant, through counsel, indicated that he may have an issue at trial with some missing evidence, in particular a surveillance video from the apartment complex where the burglary occurred. VR 08/15/2011; 10:25:41. The Commonwealth explained in response that the video was viewed by witnesses who were able to watch it on the recording system but that the system was not able to make a copy and that the system then recorded over the video. VR 08/15/2011; 10:26:20 and following. Appellant's counsel specifically asked whether the Commonwealth intended to introduce the video at trial, and the Commonwealth responded that it did not and could not because the video no longer existed. VR 08/15/2011; 10:27:21. Appellant's counsel announced that she thought that might create problems with testimony ***about the individual on the video looking like Appellant*** and that, though she did not yet know what she was going to do, she would likely seek some form of relief, specifically regarding testimony that anyone who viewed the video thought it looked like Appellant in the video. VR 08/15/2011; 10:27:37.[1] The trial court

[1] Contrary to Appellant's assertions, he was on notice that the Commonwealth intended to introduce evidence related to the video. In fact, he brought up the issue, indicating that he might want some limits on

expressed its opinion that the matter could be taken up a trial, and Appellant's counsel explicitly agreed that it could. VR 08/15/2011; 10:28:03. Accordingly, the Commonwealth offered no response to Appellant's articulated concern at that time. However, on August 30, the Commonwealth filed in discovery a summary by Detective Lewis of what he saw in the video. TR 11CR0462, 46-47. It states:

> I recall watching the video with the apartment complex manager, Carmen Montgomery, and the victim, Pearlette Isaac. From what I recall *the suspect* approached the front of the apartment and began to pry on the window with tools. After a short time he gained access to the window and climbed in. He was wearing blue jeans, blue in color, and a gray long sleeve shirt which appeared to be like a gray thermal type shirt. He entered the apartment thru the window and remained inside for a short time. After a few minutes he left by coming out the front door of the complex and out the front door of the stairwell that allowed access to the apartments inside. He leaves the apartment and walks around the sides (south west side) of the building then sight is lost of him. The video of him and his brother at the gas station shows what he was wearing from the video I watched. You can plainly see the clothes are identical to what he had on in the gas station but you can't see his face in the video. You can tell that he is a white male with specific clothing on, but the camera view was too far away to see facial features or scars or tattoos.

TR 11CR0462, 47 (emphasis added). Importantly, and contrary to Appellant's representations Detective Lewis, in his summary, does not identify Appellant by name. App. Br. 1 ("The police obtained a copy of the Circle K surveillance video and according to Detective Kevin Lewis, Garry Newkirk was wearing clothing identical to those worn by the man on the apartment complex surveillance video. (TR 11CR0462, 47)).

On September 6, 2011, both parties announced ready for trial, with Appellant conditioning his readiness on a ruling on his pretrial motion to reassign the trial to a different date because of an alleged taint of the jury pool. VR 09/06/2011; 12:04:44 and

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the testimony, but then agreeing to table that issue until trial. His suspicions that the Commonwealth intended to introduce evidence about the surveillance video should have been confirmed when the Commonwealth subsequently filed Detective Lewis's summary.

following. Appellant made several pretrial motions at that time. One of them was to exclude any testimony about the contents of the apartment surveillance video. VR 09/06/2011; 12:10:17. Appellant claimed (1) that the video was hearsay; (2) that allowing anyone to testify to what they saw on the video would violate KRE 701 and 702 because they would lack personal knowledge of what they were testifying to; and (3) that admission of the testimony would violate Appellant's confrontation rights under the Kentucky and federal constitutions. VR 09/06/2011; 12:10:17 and following. Appellant referred the trial court to Fields v. Commonwealth and Mills v. Commonwealth.[2] VR 09/06/2011; 12:11:18. The Commonwealth responded that the video was not hearsay, that the witnesses could properly describe what they saw on the video and be cross-examined concerning it, and as with other evidence, the jury would be called upon to decide their credibility. VR 09/06/2011; 12:14:55 and following. The Commonwealth also pointed out that the witness would not say that it was Appellee in the video. VR 09/06/2011; 12:14:55, 12:18:32.

The trial court ruled that regardless of the content of the testimony about the video, its admission would violate Appellant's constitutional right of confrontation and set terrible precedent that would open the door to all kinds of abuses by police and prosecutors and give them incentive to never turn over videotapes. VR 09/06/2011; 12:19:44. The trial court also believed admission of the evidence would hamper the defense. VR 09/06/2011; 12:21:50. The trial court sustained Appellant's motion and excluded any testimony concerning the videotape or any conclusions drawn from it. VR 09/06/2011; 12:25:58. The trial court indicated that if the surveillance video was

[2] Although Appellee did not provide case citations for either of these cases, the Commonwealth believes Appellee was referring to Fields v. Commonwealth, 12 S.W.3d 275 (2000) and Mills v. Commonwealth, 996 S.W.2d 473 (1999).

available, it would rule differently and that its order was based on its belief that it would be fundamentally unfair to allow witnesses to testify about something that was not available. VR 09/06/2011; 12:23:17.

The trial court began conducting individual voir dire regarding the alleged taint upon the jury pool and as a prerequisite to ruling on Appellant's motion to reassign the trial date. VR 09/06/2011; 01:55:55 and following. After several hours had passed, the Commonwealth brought up the issue of testimony about the surveillance video, specifically to ask the trial court for a copy of its ruling and additional time to research the ruling and consider its options in light of the ruling. VR 09/06/2011; 04:49:50. The trial court declined to provide a copy of any written ruling at that point, but reiterated that its ruling was "fairly straight forward" that because the tape was never made available to defense counsel, through no fault of the Commonwealth, it would be "entirely inequitable" to require defense counsel to cross-examine a witness without having reviewed the tape. VR 09/06/2011; 04:50:00 and following. The trial court again indicated it believed admission of the evidence would violate the confrontation clause. VR 09/06/2011; 04:51:37.

When the Commonwealth indicated that the exclusion of the evidence would create a hole in its evidence because it was the link that ultimately led police to Appellee, the trial court indicated it would consider that overnight. VR 09/06/2011; 04:53:30. The trial court expressed concern that any reference to the videotape could lead the jury to draw "unfounded conclusions" about what was in the video. VR 09/06/2011; 04:53:57 and following. The trial court expressed its belief that by allowing evidence concerning

the video, Appellant's right to a fair trial would be "severely compromised" because the jury might draw inferences about the tape. VR 09/06/2011; 05:55:30 and following.

The trial court indicated that it had given its ruling with regard to the videotape and that if the Commonwealth desired to do so, it could again revisit the issue in the morning; the trial court then proceeded with individual voir dire. VR 09/06/2011; 04:55:53 and following. At the close of individual voir dire, the trial court ruled that the jury panel had not been tainted by statements made by the deputy sheriff or news coverage about it and denied Appellant's motion to reassign the trial. 09/06/2011; 06:31:30.

The following morning, the Commonwealth made its motion to continue as described in Appellant's statement of the case. The Circuit Court denied the motion to continue. VR 09/07/2011; 10:46:56. The Commonwealth then moved to dismiss without prejudice, and the Circuit Court sustained that motion. VR 09/07/2011; 10:45:56 and following.

Following the dismissal, the Commonwealth, in an attempt to better understand the Circuit Court's ruling regarding the video surveillance, asked the Judge if his ruling was premised on KRE 403. VR 09/07/2011; 10:48:35. The Judge denied that it was, stated again that he did not believe it was permissible for the officer to testify about a tape that was not preserved, and analogized to a murder case where the murder weapon was found and subsequently lost, in which case he believed it would be improper to testify about the weapon and any fingerprints, etc., found on it. VR 09/07/2011; 10:48:57. The Circuit Court emphasized that he believed the Commonwealth had an obligation to preserve the video and because it did not do so, he believed it was inequitable to allow testimony

concerning it. VR 09/07/2011; 10:50:08. The Circuit Court explained that its ruling was based on its belief that there should be no case that comes in where there has been a review of a videotape that has not been preserved, repeated requests for the actual videotape without production of the videotape, and then an intention on the day of trial to have testimony about the tape by a detective who viewed it. He believed that such circumstances would be fundamentally inequitable and would lead to abuses in the system because there would be no incentive ever to preserve a videotape. VR 09/07/2011; 10:52:23. He further believed that the witness could not be fairly cross-examined regarding the unpreserved video that he should have preserved but did not preserve. VR 09/07/2011; 10:53:25. The Circuit Court explained that it was trying to prevent abuses. 09/07/2011; 10:53:49. The Circuit Court seemed particularly troubled that the issues concerning testimony about the videotape were not raised until trial, despite that Appellant had raised the issue previously and he had passed the matter until trial. VR 09/07/2011; 10:51:57; 10:53:49.

## ARGUMENT

### I. The Court of Appeals' opinion is well-reasoned, thorough, and accurate, and this Court should consider adopting it in full or in part.

On November 21, 2014, the Court of Appeals issued a 49 page "To Be Published" opinion reversing the trial court's order excluding all evidence regarding the content of the surveillance video. This opinion is well-reasoned, thoroughly considers and applies the applicable law, and accurately addresses the issues raised in this appeal.

The Court of Appeals found that the evidence "is expressly admissible under Kentucky Rules of Evidence (KRE) 402 and 1004." App. Br. A 1.[3] Because the trial court's written ruling contained only "skeletal language" regarding its ruling excluding evidence about the content of the unavailable surveillance video, the Court of Appeals considered in detail the reasons articulated by the trial court on the record as grounds for excluding the evidence. App. Br. A7 and following. The Court of Appeals noted that the trial court rejected various reasons for excluding the evidence—for example, that it violated the Confrontation Clause or was unduly prejudicial under KRE 403—and "embrace[d] equity and fundamental fairness as the basis of its ruling" excluding testimony about the surveillance video. App. Br. A11. The Court of Appeals concluded that the circuit court "found fault with Detective Lewis for failing to preserve the videotape ("he should have preserved it"), and attributed Newkirk's inability to view the tape to that failure—a failure the court already ruled did not occur in bad faith—and not a failure of the technology itself. Such circumstances, according to the circuit court, are unfair to the defendant, and that was the basis of the court's ruling." App. Br. A12-A13.

The Court of Appeals then proceeded to evaluate whether "fairness" alone was a proper basis for excluding evidence about the video. App. Br. A13-A14. The Court explained that the concept of fairness "is amorphous, general, and subjective" and generally such an "unstructured concept" that it cannot be applied as an evidentiary rule. App. Br. A13-A14. Because the trial court relied on "nothing more than its own intuitive perception of fairness to prohibit" testimony about the content of the surveillance video,

[3] Pursuant to CR 76.12(4)(d)(v), this opinion is not attached to the Commonwealth's brief in the appendix because it was provided by Appellant as Appendix A. For the Court's convenience, the Commonwealth will cite the opinion with the individual page numbers assigned by Appellant in his Appendix. These page numbers correspond with the page number of the slip opinion; however, they are prefaced with the letter "A".

the Court found that, unless there was another reason to affirm the exclusion of the evidence, that decision was "arbitrary and unsupported by sound legal principles, thereby constituting an abuse of discretion." App. Br. A14.

In determining whether there existed any legal reason to exclude evidence about the surveillance video, the Court of Appeals considered KRE 402, the United States and Kentucky Constitutions, Kentucky Statutes, and additional rules of evidence including, KRE 403, 602, 701, 702, 801, 802, 1001, 1002, 1004, and 1008. The Court specifically found that evidence about the surveillance video was relevant under KRE 402. App. Br. A16. The Court found no violation of the United States or Kentucky Constitutions' confrontation clauses because "the videotape itself is not a human being capable of confrontation," "the videotape did not memorialize the testimonial statement of a human being; rather, it recorded the crime itself," because there is no constitutional right to use the video for impeachment purposes, and because the unavailability of the video is not a restriction on cross-examination." App. Br. A16-19. Finding that admission of the testimony would be appropriate based on rules that are well-tested and objectively applied throughout the nation, the Court rejected claims that the Fourteenth Amendment to the United States Constitution and Section 2 of the Kentucky Constitution were violated. App. Br. A20-21. The Court dismissed the claim that Appellant's constitutional due process rights were violated by the failure to produce the video because there was no showing of bad faith on part of the Commonwealth. App. Br. A21-22. The Court also considered and found that no Kentucky statute precluded admission of testimony about the surveillance video. App. Br. A22.

The Court then considered various other rules of evidence that might be considered grounds for the trial court's ruling. It found that KRE 602 did not prohibit testimony about the surveillance video by those who personally observed it because their testimony would be based on observations made by "utilizing [their] senses" after "perceive[ing] the contents of the videotape." App. Br. A28. The Court found KRE 702 inapplicable because there was no indication the police detective would be testifying as an expert witness. App. Br. A29. Similarly, the Court found that KRE 701 would not apply because "the Commonwealth indicates that it intends to elicit only fact testimony from the detective and not opinion testimony." App. Br. A29. Nevertheless, the Court pointed out that KRE 701 would not necessarily preclude a witness who observed the surveillance video from drawing inferences and expressing opinions so long as the evidence otherwise comported with the rules of evidence. App. Br. A33. The Court found that neither KRE 801 nor KRE 802 supported exclusion of the testimony because the surveillance video, nor testimony about it, was hearsay. App. Br. A36. Finally, the Court reviewed the best evidence rule, KRE 1002, and its exceptions, and found that testimony regarding the content of the surveillance video was admissible under KRE 1004(1) as "other evidence of the contents of the destroyed videotape." App. Br. A44.

The Court considered whether, despite being otherwise admissible, the testimony should be excluded under KRE 403 because it would be unduly prejudicial and found that it should not. App. Br. A45. The Court found that no other Supreme Court Rules supported exclusion of the evidence. App. Br. A46-48. Throughout its opinion, the Court of Appeals discussed various Kentucky cases as well as case from other jurisdictions—all supporting its conclusions. Ultimately, the Court of Appeals reversed

the erroneous evidentiary ruling excluding testimony about the contents of the surveillance videos and then declined to consider the Commonwealth's argument that the trial court also erred by denying the Commonwealth's motion for a continuance, finding that argument moot given the reversal. App. Br. A48.

Given the depth of treatment of the issues, the sound reasoning of the Court, and the accuracy of the Court's outcome, this Court should consider adopting, in full or in large part, the Court of Appeals' opinion. Such action is not unknown to this Court and has been previously employed when the Court of Appeals accurately and effectively resolves important legal issues. See *e.g.*, *Couch v. Natural Resources and Environmental Protection Cabinet*, 986 S.W.2d 158, 159 (Ky. 1999) (adopting "in full" the "sound and well-reasoned" opinion of the Court of Appeals); *Brewer v. Commonwealth*, 922 S.W.2d 380 (Ky. 1996) ("having determined that the opinion of the Court of Appeals satisfactorily addresses the issues raised" and adopting that opinion); and *Layne v. Newberg*, 841 S.W.2d 181, 182 (Ky. 1992) (noting that the Court of Appeals "thoroughly considered the circumstances of this case and the applicable law" and adopting its opinion). Even if the Court is inclined not to adopt the Court of Appeals' thorough and accurate opinion, the Court should affirm the Court of Appeals for the reasons discussed below.

## II. The Court of Appeals correctly held that the trial court abused its discretion by excluding all testimony about the content of the surveillance video.

As noted above, the Court of Appeals properly found testimony about the contents of the surveillance video admissible under KRE 1004. The Court explained:

> The bottom line is this: when an original photograph or videotape is available, the original is the evidence that must be admitted; alternative or substitute proof of an available photograph or videotape is inadmissible.

Fortunately for the Commonwealth in this case, there are exceptions to the best evidence rule. KRE 1002 ("original . . . is required, except as otherwise provided in these rules, in other rules adopted by the Kentucky Supreme Court, or by statute"). The exception applicable to the circumstances of this case is found in KRE 1004(1) which says "[t]he original is not required, and other evidence of the contents of a . . . photograph [including a videotape] is admissible if . . . [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith[.]" KRE 1004(1). A few requirements must be satisfied before this exception will apply.

First, the originals must have been lost or destroyed. This is "a condition of fact . . . for the court to determine in accordance with the provisions of KRE 104." KRE 1008. On this record, Newkirk has not challenged the Commonwealth's representation that the videotape has been written over, *i.e.*, destroyed. Furthermore, the circuit court has effectively determined this condition of fact by stating: "In essence, the ruling is this: The tape is not available . . . ." (VR 09/0611; 4:50:16).

A second condition of fact for the court to determine, prior to admitting other evidence of a videotape's contents, is whether "the proponent lost or destroyed them in bad faith[.]" KRE 1004(1). As we discussed earlier, there is nothing in the record to suggest the Commonwealth engaged in bad faith with regard to this evidence, and the circuit court said as much, stating that the videotape was unavailable "through no fault of the Commonwealth." (VR 9/0611; 4:50:30).

When this case is again in the circuit court, if "an issue is raised [by Newkirk w]hether the asserted [original videotape] ever existed [or w]hether other evidence of its contents[, *e.g.*, Detective Lewis's testimony] correctly reflects the contents [of the original videotape], the issue is for the trier of fact[, *i.e.*, the jury] to determine as in the case of other issues of fact." KRE 1008(a), (c).

Our description of the workings of the best evidence rules is plainly illustrated in an unpublished opinion of this Court, *Haley v. Commonwealth*, 2013 WL 4508177 (Ky. App. Aug. 23, 2013) (2011-CA-001987-MR). *Haley* was decided under the palpable error analysis of the Kentucky Rules of Criminal Procedure (RCr) 10.26. However, the facts and legal analysis are consistent with our opinion today. Because they are, and because there is no other authority on point, we have considered and are persuaded by the reasoning in *Haley*.

In *Haley*, a Kentucky State Trooper viewed a videotape recorded by a surveillance camera mounted in a pawn shop where stolen property was

recovered. The trooper could identify the appellant, Haley, in the videotape, but the video was subsequently recorded over. The circuit court allowed the trooper's testimony as other evidence of the contents of the videotape, specifically Haley's presence in the pawn shop. Haley contended:

> That the circuit court erred by admitting into evidence certain testimony of Kentucky State Trooper Greg Dukes. Appellant claims it was prejudicial error for Trooper Dukes to testify concerning the contents of a surveillance videotape taken at the Logan County pawn shop where the stolen rings were recovered. Appellant argues that the videotape was not produced at trial and that Trooper Dukes' testimony was inadmissible per Kentucky Rules of Evidence (KRE) 1002. Under KRE 1002, appellant asserts that the contents of a recording may only be proved by the original recording or a copy of the recording. . . .
>
> Under KRE 1004(1), the original videotape recording is not required if "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith[.]" Here, the evidence revealed that the original surveillance videotape was destroyed before a copy could be made. It appears that the original surveillance videotape was inadvertently rewound and copied over by the pawn store. Thus, the destruction of the original surveillance videotape was not due to bad faith but rather was a mistake.
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> . . . .
>
> Upon the whole, we are unable to conclude that the admission of Trooper Dukes' testimony as to the surveillance videotape violated a substantial right resulting in manifest injustice per RCr 10.26. We, thus, reject this contention of error.

*Haley v. Commonwealth*, 2013 WL 4508177, at *2-*3.

*Haley* is consistent with other jurisdictions applying evidentiary rules indistinguishable from our own. Illustrative of those other jurisdictions is Oregon. Newkirk himself cites an Oregon case, *State v. Nelsen*, 183 P.3d 219 (Or. App. 2008), which he admits supports the Commonwealth's argument that "the trial court erred in preventing the state from introducing testimony about the contents of a lost recording." (Appellee's brief at 15) (citing *Nelsen*, 183 P.3d at 225-26). In *Nelsen*, as in our case, the police were "unable to make a copy [and] the video footage was no longer available because, apparently, the video system had automatically recorded over the footage" of a robbery at a laundromat. *Nelsen*, 183 P.2d

> at 445. Similar to the facts of our case, in *Nelson* [*sic*] "the state sought to introduce . . . the testimony of Rees [the victim] and Byram [the police officer], who would have described what they had seen on the video. Defendant moved *in limine* to exclude . . . the testimony" and the trial court granted the motion. *Id.* at 221. The appellate court reversed saying, "We conclude, contrary to the trial court's understanding, that, because the original videotape was recorded over while in the possession of a third party (the laundromat owner, Rees), who did not act at the state's direction or was not otherwise an agent of the state, the state did not lose or destroy the videotape." *Id.* at 223 (emphasis omitted). "Consequently, [Rule] 1004(1) applies, and the best evidence rule does not preclude Byram's and Rees's testimony describing the contents of the surveillance videotape." *Id.* at 224.
>
> *Nelsen* is but one of many cases to apply this best evidence rule exception to similar facts; they uniformly reach the conclusion we reach today.
>
> We conclude, pursuant to KRE 402 and 1004(1), that the testimony of Detective Lewis (and anyone who viewed the videotape is admissible other evidence of the contents of the destroyed videotape.

App. Br. A39-A44.

In two recent unpublished opinions, this Court has similarly applied KRE 1004(1) and upheld admission of testimony regarding the contents of lost or destroyed videos. In the first one, *Stovall v. Commonwealth*, 2013-SC-000788-MR, 2014 WL 7239876, *1 (Ky. Dec. 18, 2014) (attached as Appendix 1), the defendant was convicted by jury of four counts of first-degree criminal mischief, three counts of third-degree burglary, and two counts of theft by unlawful taking, for crimes committed on the same night at three different businesses in Boyle County. The surveillance video from the first business—Parksville Country Store—led police to suspect that "one black male and two white males" "driving a dark colored sport utility vehicle" were the perpetrators of the burglaries. *Id.* Police came in contact with two of the suspects around 12 hours later and police "noticed that the passengers were dressed the same as the burglars on the

surveillance video." *Id.* The suspects, including, the defendant were arrested and charged with crimes related to the burglaries. *Id.*

At trial, a police officer "testified that he personally saw the video and that it showed three males in hooded sweatshirts breaking into the store and ransacking it. However, the video was never produced to Appellant, and it was not played for the jury at trial." *Id.* at *5. There was testimony at trial that the owner of the store "inadvertently taped over or erased the pertinent video recording." *Id.* In finding that the police officer's testimony about the video was properly admitted under KRE 1004(1), this Court explained:

> KRE 1002 provides, "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, *except as otherwise provided in these rules* . . . ." (Emphasis added.) "Essentially, this rule requires a party to introduce the most authentic evidence which is within their power to present." *Savage v. Three Rivers Med. Ctr.*, 390 S.W.3d 104, 114 (Ky. 2012). KRE 1004 states that "[t]he original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if: (1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith . . . ." "Other evidence" as prescribed in KRE 1004 includes any type of secondary evidence, such as oral testimony, and is not limited to just duplicates of the original. *See* Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 7.20[5] (5th ed. Lexis 2013) (citing Evidence Rules Study Committee, Kentucky Rules of Evidence, p. 111 (Nov. 1989)) ("A satisfactory explanation for nonproduction of the original eliminates the impact of Rule 1002 . . . and leaves the offering party free to produce whatever secondary evidence he thinks will be most helpful to his case.").
>
> The burden of proving than an original was lost or destroyed rests with the offering party. That party is also required to call the last known custodian, if available, to testify to the loss or destruction of the original. *Taulbee v. Drake*, 198 S.W.2d 50 (Ky. 1946); *see also* Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 7.25[2][b] (5th ed. Lexis 2013). After hearing the offering party's explanation for the loss or destruction of the original, it is within the trial court's discretion to determine whether the loss was in bad faith. *See* Robert G. Lawson, *The Kentucky Evidence*

> *Law Handbook*, § 7.25[2][b] (5th ed. Lexis 2013) (citing Evidence Rules Study Committee, Kentucky Rules of Evidence, p. 111 (Nov. 1989)).
>
> In the present case, the Commonwealth satisfied its obligations by calling the store owner to testify that he inadvertently lost or recorded over the surveillance footage. Officer Stratton also testified that he watched the video before it was erased. Appellant did not offer any evidence suggesting that the video was lost or destroyed in bad faith. Thus, we hold that it was within the trial court's discretion to determine that Officer Stratton's testimony was the most authentic evidence of the video that the Commonwealth was capable of presenting and therefore admit the testimony.

*Id.* at *6.[4]

This Court then affirmed Stovall's co-defendant's convictions in *Johnson v. Commonwealth*, 2013-SC-000787-MR, 2015 WL 3635292 (Ky. Sept. 24, 2015) (attached to Appellant's Brief as Appendix E). In that case, the Court described that the three burglaries had been captured, at least in part, on surveillance video at the three different businesses. *Id.* at *1. At the first location, "the deputy viewed a security video of the burglary but did not obtain a copy of it. The video was apparently later deleted, and no copy was ever produced for the defense." Police obtained video footage from the second location "which showed what appeared to be a black male and a white male, both wearing hooded jackets or sweatshirts, dark pants, and distinctive sneakers. The video also showed the men leaving in what appeared to be a dark-colored sports utility vehicle (SUV)." *Id.* At the third location, "[i]nstead of getting a copy of the [surveillance] video, the deputy recorded the playback of the video with his cell phone." *Id.* At trial, an officer "testified that he personally viewed the video [from the first business robbery] which showed three males in hooded sweatshirts breaking into the store and ransacking

[4] The Court also rejected the defendant's claim that admission of the testimony violated the Confrontation Clause because that clause "only applies to hearsay matters" and "[t]he burglars' actions on the surveillance video were not intended to be assertions" and the defendant "had the opportunity at trial to cross-examine [the officer] about his recollection and account of the video." *Id.*

it. However, this video was never produced to Johnson, and it was not played for the jury at trial." *Id.* at *6. Employing the same reasoning as in *Stovall*, this Court affirmed admission of evidence about the surveillance video noting of importance that "Officer Stratton also testified that he watched the video before it was destroyed, giving him *personal knowledge as to its contents*" and that "the video was never in the Commonwealth's possession, and the rule requires that the proponent of the proof . . . have lost or destroyed the evidence in bad faith before the exception becomes inapplicable." *Id.* (emphasis added).[5]

As noted by the Court of Appeals in its opinion in this case, the interpretation of the best evidence rule applied by this Court is widely employed. See App. Br. A43, fn. 23, citing cases from nine state and federal jurisdictions allowing admission of testimony about the content of lost or destroyed video footage.

Additionally, a court in at least one other jurisdiction has made similar findings since the Court of Appeals ruled in this case. In *State v. Robinson*, 118 A.3d 242, 244 (Me. 2015), a defendant who had been convicted by jury of burglary and theft complained on appeal that "the trial court abused its discretion by allowing a witness to testify regarding the witness's previous identification of Robinson in a now-unavailable surveillance video recording." After the trial jury was selected, the State learned for the first time that a surveillance video recording system had captured the burglary, that the store owner had viewed the video four or five days after the burglary and identified the defendant in the video, and that the video "had been automatically recorded over

[5] As in *Stovall*, the Court also rejected claims that the hearsay rules and Confrontation Clause were violated by admission of testimony about the unavailable video noting that the conduct on the video was not "intended as an assertion", "the video itself was not witness testimony", and the defendant "had the opportunity to cross-examine [the officer] about his recollection and account of the video." *Id.* at *7.

approximately a month after it was initially recorded, as a normal function of the surveillance system." *Id.* at 245. The Court found that the owner's testimony about the video was admissible under Maine Rule of Evidence 1004(1) because the original video was unavailable, and Maine's rule—like Kentucky's—allows that once an exception applies "any type of secondary evidence, not otherwise inadmissible, becomes admissible." *Id.* at 248 (internal quotation omitted). The Court expressly recognized that the credibility of the evidence "does not affect its admissibility, but only its weight. The weight is a matter for the trier of fact to resolve." *Id.* (internal quotation omitted). Similarly in this case, testimony about the surveillance video was admissible under KRE 1004(1). As found by the Court of Appeals, the trial court abused its discretion when it excluded the proposed testimony because of its "subjective sense of fairness," since the evidence was specifically admissible under KRE 1004(1). App. Br. A14.

Appellant's only response to the Court of Appeals' finding that the evidence should have been admitted under KRE 1004(1) is that the cases the Court relied upon are distinguishable. First, Appellant claims that *Haley*, the Court of Appeals' prior unpublished opinion upon which it relied, is distinguishable because "[u]nlike the State Trooper in *Haley*, Detective Lewis did not know Garry Newkirk by sight and could not positively identify him as the person on the apartment surveillance video." App. Br. 19. First, in *Haley*, the officer's recognition of the defendant was not a critical fact in the determination that the officer's testimony describing what he observed when he watched the video was admissible; rather it was a factor in determining that even if there had been some error, there was not manifest injustice. App. Br. D2; *Haley*, 2013WL 4508177 at *3. Second, Appellant assumes—without any citation to evidence in the record—that

Detective Lewis had no familiarity with Garry Newkirk. While, if such evidence is introduced at trial, it might be cause to limit the extent of any lay opinions Detective Lewis can give (see discussion regarding KRE 702 below), this assumption—which was never argued before the trial court as grounds for excluding the testimony—cannot serve to completely exclude all testimony about what the officer perceived with his eyes when he watched the video.

The other attempts to distinguish the cases cited by the Court of Appeals does little more than show that while no two cases are exactly, factually alike, despite the idiosyncrasies of individual cases, the best evidence rule and its exceptions apply uniformly and in varying contexts. See, for example, Appellant's discussion on pages 22 and 23 about the four unpublished cases cited by the Court of Appeals, wherein it is apparent, that despite Appellant's attempts to claim that Detective Lewis' testimony should be inadmissible because he supposedly lacked personal knowledge of Appellant, not all courts have required prior personal knowledge about the subject depicted in the video in order to allow testimony about what was seen when the video was viewed. Because there is no real, significant distinction that renders the reasoning of the other cases inapplicable to his case, Appellant points out and relies on minor factual differences and even goes so far as to presume factual distinctions that support his theory. For example, when he discusses *State v. Johnson*, 704 So.2d 1269 (La. App. 2 Cir. 1997), the only distinction he can draw is based on his own presumption about what the officers knew—App. Br. 21—the same unsupported presumption that he makes in this case.

Because the Court of Appeals properly found that it was an abuse of discretion to exclude testimony about the contents of the unavailable surveillance video based on a

subjective sense of fairness when the evidence is explicitly admissible under KRE 1004, this Court should affirm the Court of Appeals.

### III. Neither KRE 701 nor KRE 602 precludes testimony about the contents of the unavailable surveillance video.

Appellant's primary claim is that regardless of what is permitted by KRE 1004, KRE 701 and KRE 602 prohibit the testimony sought by the Commonwealth. His arguments are premised on the assumption that Detective Lewis would offer testimony that the man in the unavailable surveillance video was Appellant. Repeatedly Appellant argues that the police detective "would be testifying that it is his opinion that the two men [the man on the unavailable surveillance video and the man on an available surveillance video from another location] are the same person." App. Br. 12; see also App. Br. 24 ("the Commonwealth intended to introduce testimony through Detective Lewis . . .that the two men [in the unavailable surveillance video and the available surveillance video from another location] are the same person."); App. Br. 25 ("Detective Lewis would have testified that the man in the apartment surveillance video was wearing the same clothing that Garry Newkirk was wearing in the Circle K surveillance video, and therefore, was Garry Newkirk."). However, the record reveals that though the Commonwealth sought the testimony because the video was the link that ultimately led police to Appellant, the Commonwealth specifically denounced any intention to have Detective Lewis testify that it was Appellant he saw in the video. VR 09/06/2011, 12:14:55, 12:18:32, 04:53:30.

In any event, the Court of Appeals properly rejected claims that KRE 701 and KRE 602 preclude testimony about the content of the unavailable surveillance video. As to KRE 602, the Court wrote:

KRE 602 "limits a lay witness's testimony to matters to which he has personal knowledge[.]" *Mills v. Commonwealth*, 996 S.W.2d 473, 488 (Ky. 1999), *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010). The crux of KRE 602 is that, as a foundation, a witness must possess first-hand or personal knowledge of the facts of a matter to which he will testify. In other words, lay witness testimony must be based upon his own knowledge or perceptions. *See Young v. Commonwealth*, 50 S.W.3d 148, 170 (Ky. 2001).

Personal knowledge is that which the witness perceives through the use of his physical senses—that which is heard, felt, seen, smelled, or tasted. *See Commonwealth v. Diebold*, 202 Ky. 315, 259 S.W. 705, 706 (1923) (explaining "personal knowledge [is] received and experienced through one of the five senses[.]"). The parties vigorously dispute whether the detective cleared KRE 602's personal-knowledge hurdle.
Newkirk contends Detective Lewis was not standing outside near the window of the victim's apartment to personally observe, in real time, a Caucasian male wearing certain clothing enter Isaac's apartment on November 7, 2010. Newkirk posits that the Commonwealth cannot establish the requisite foundation of personal knowledge necessary under KRE 602 because the detective only observed the event after the fact on the apartment complex surveillance video.

In support, Newkirk cites *Harwell v. Commonwealth*, 2011 WL 1103112 (Ky. March 24, 2011) (2009-SC-000333-MR). As in our case, *Harwell* dealt with a crime captured on surveillance videotape. Unlike our case, the videotape was available at trial. Three separate segments of videotape were part of the Commonwealth's case, but only segments one and two were offered into evidence. Two women—the victim and a witness—testified relative to the second and third segments of the videotape. Neither was present when the recorded events occurred. *Harwell*, 2011 WL 1103112, at *9-*10.

The women's testimony regarding the second segment was deemed improper under KRE 602. There are actually two aspects to this ruling. The first is that neither woman had personal knowledge of the perpetration of the crime itself; therefore, under KRE 602, they could not testify as to that matter. Second, this same lack of personal knowledge also disqualified them from offering any *simultaneous commentary* regarding the second segment of videotape—evidence that was both available and admissible as proof. Only "a witness who was present when the recorded events occurred may 'narrate,' *i.e.*, testify from personal recollection while the tape play[s]" *Id.* at *9 (citing *Gordon v. Commonwealth*, 916 S.W.2d 176, 179-80 (Ky. 1995)).

Applying this rational from *Harwell* tells us only that Detective Lewis lacked the personal knowledge to present eyewitness testimony about the crime, and that he could not have provided simultaneous commentary to the videotape if it had been admitted into evidence. The Commonwealth did not offer testimony of this kind. Therefore, we find Newkirk's argument under this analysis unpersuasive.

That is not to say the line of simultaneous-commentary cases has nothing to offer our analysis. We infer from them an important principle—a witness's testimony about a videotape is admissible on grounds independent of those that make the videotape itself admissible. The only prerequisite beyond relevancy is that such testimony be based on personal knowledge and be in compliance with KRE 701. *Mills*, 996 S.W.2d at 488. With that principle in mind, we move on to the Commonwealth's argument.

The Commonwealth asserts that the matter about which Detective Lewis would testify is the personal knowledge he gained from observing and perceiving the videotape before it was destroyed. His testimony would simply be a recounting of the facts of his actual observation. According to the Commonwealth, he observed a video depicting a Caucasian male wearing blue jeans and a gray long-sleeve shirt who entered an apartment through a window the male pried open with tools. We cannot accept the illogic of Newkirk's position that the detective did not have personal knowledge of what he saw on the videotape. And yet there is a dearth of Kentucky case law directly on this issue.

The Commonwealth, however, cites a persuasive case on this point from a sister state—*State v. Rollins*, 257 P.3d 839 (Kan. App. 2011). In *Rollins*, the appellate court affirmed the trial court's order admitting testimony about a "destroyed videotape . . . which ha[d] not been able to be reviewed by the defense." *Id.* at 847. As in our case, defense counsel objected to admission of the evidence on hearsay and confrontation clause grounds, but, also as in our case, abandoned those arguments on appeal in favor of an argument that a proper foundation had not been laid. *Id.* The appellate court rejected that argument as we do, stating:

> [The witness] perceived or observed the surveillance videos through his own senses and remembered or recalled the observation or perception. The State established [the witness's] testimony was based on personal knowledge of the surveillance videos' contents and, consequently, a proper foundation was laid for [the witness's] testimony about what he observed on the videos.

> *Id.* at 848. We note here that Newkirk, citing *Rollins*, acknowledges that "a few . . . jurisdictions upheld the admission of testimony concerning deleted surveillance videotape." (Appellee's brief at 15) (also citing *State v. Nelsen*, 183 P.3d 219, 225-26 (Or. App. 2008)).
>
> After careful consideration, we find the Commonwealth's position persuasive. The detective personally viewed the surveillance videotape and, utilizing his senses, perceived the contents of the videotape; he is capable of expressing his observations to a jury.
>
> Based on the foregoing, we hold that KRE 602 does not prohibit Detective Lewis from testifying to facts he perceived from his viewing of the surveillance video. This reasoning applies equally to other witnesses who may testify as to the surveillance video's contents, such as Isaac or the apartment complex's manager.

App. Br. A24-A28.

Appellant appears to argue that Detective Lewis lacked the necessary "personal knowledge" for two reasons: (1) he was not present and watching when the crime was committed and (2) he did not previously know Appellant. As to the first of these requirements, Appellant relies on *Mills v. Commonwealth*, 996 S.W.2d 473 (Ky. 1999), *Fields v. Commonwealth*, 12 S.W.3d 275 (Ky. 2000), *Milburn v. Commonwealth*, 788 S.W.2d 253 (Ky. 1989), and *Harwell v. Commonwealth*, 2009-SC-000333-MR, 2011 WL 1103112 (Ky. March 24, 2011). However, none of these cases means that Detective Lewis, who personally observed the recorded surveillance video, did not possess the necessary personal knowledge to testify about what he observed on the surveillance video.

In *Fields*, for example, the problematic video, which included an audio narration, was a recording of a staged reenactment of the investigation. 12 S.W.3d at 279. It was not a recording of the crime as it occurred. The court found that the video was admissible, but that the audio narration was not admissible because the unsworn narration

was hearsay. *Id.* at 279-281. The court issued no opinion about whether an officer would have been permitted to give live testimony narrating the video although it did cite with favor and distinguish *Milburn*, in which the court affirmed the playing of a video with simultaneous commentary "by the investigating officer from the witness stand describing the contents of the video as it was being played." *Id.* at 280. The *Fields* also court noted that the officer "had already testified to the exact same facts which were repeated in the recorded narration." *Id.* Because the recorded narration was inadmissible hearsay—an out of court statement offered for its truth—the same information was not precluded when provided by a live witness who was subjected to cross-examination. In this case, hearsay is not an issue. As noted by the Court of Appeals, even Appellant "effectively abandoned his hearsay argument on appeal." App. Br. A34. Rightfully so. The video recording was not hearsay. Hearsay "is a statement, other than [one] made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." KRE 801(c). A statement is "[a]n oral or written assertion" or "[n]onverbal conduct of a person, if it is intended by the person as an assertion." KRE 801(a). In this case, the video recording captured at least a portion of the commission of the crime—not an act intended to be any kind of assertion. Moreover, there is no indication that the video included any statements by any person. When Detective Lewis testified about what he saw on the video, his statements—as the declarant—would not be statements "other than [those] made by the declarant while testifying at the trial." KRE 803(c). Unlike the inadmissible recorded narration in *Fields*, Detective Lewis' testimony about what he saw on the video was not hearsay. See also App. Br. A34-A36.

In *Mills*, 996 S.W.2d at 488 (Ky. 1999), a police detective's live narration of the crime scene was played for the jury was proper because it was "rationally based on [the officer's] perceptions of the crime scene." The testimony sought to be introduced here would have been rationally based on the officer's perceptions of a surveillance video. Appellant would have had the opportunity to cross-examine Detective Lewis about the limits of his perception.

The Court of Appeals discussed at length why *Harwell* does not compel the result sought by Appellant.

> In Support, Newkirk cites *Harwell v. Commonwealth*, 2011 WL 1103112 (Ky. March 24, 2011) (2009-SC-000333-MR). As in our case, *Harwell* dealt with a crime captured on surveillance videotape. Unlike our case, the videotape was available at trial. Three separate segments of videotape were part of the Commonwealth's case, but only segments one and two were offered into evidence. Two women—the victim and a witness—testified relative to the second and third segments of the videotape. Neither was present when the recorded events occurred. *Harwell*, 2011 WL 1103112, at *9-*10.
>
> The women's testimony regarding the second segment was deemed improper under KRE 602. There are actually two aspects to this ruling. The first is that neither woman had personal knowledge of the perpetration of the crime itself; therefore, under KRE 602, they could not testify as to that matter. Second, this same lack of personal knowledge also disqualified them from offering any *simultaneous commentary* regarding the second segment of videotape—evidence that was both available and admissible as proof. Only "a witness who was present when the recorded events occurred may 'narrate,' *i.e.*, testify from personal recollection while the tape play[s]." *Id.* at *9 (citing *Gordon v. Commonwealth*, 916 S.W.2d 176, 179-80 (Ky. 1995)).
>
> Applying this rationale from *Harwell* tells us only that Detective Lewis lacked the personal knowledge to present eyewitness testimony about the crime, and that he could not have provided simultaneous commentary to the videotape if it had been admitted into evidence. The Commonwealth did not offer testimony of this kind. Therefore, we find Newkirk's argument under this analysis unpersuasive.

> That is not to say the line of simultaneous-commentary cases has nothing to offer our analysis. We infer from them an important principle—a witness's testimony about a videotape is admissible on grounds independent of those that make the videotape itself admissible. The only prerequisite beyond relevance is that such testimony be based on personal knowledge and be in compliance with KRE 701. *Mills*, 996 S.W.2d at 488.

App. Br. A24-26. In this case, the testimony about the contents of the surveillance video was relevant and based on Detective Lewis' personal observations of the surveillance video.

Appellant also seems to argue that because Detective Lewis was not previously acquainted with him, Detective Lewis lacks the required personal knowledge to testify to the contents of the video. Whether Detective Lewis knew Appellant at the time he viewed the video has no bearing on Detective Lewis's ability to factually describe what he saw on the video. Nor would it have any bearing on his ability to compare the clothing he saw in the unavailable surveillance video with the clothing worn by one of the men in the Circle K video. While Detective Lewis's prior personal knowledge of Appellant might potentially affect whether he would be able to explicitly opine that the man he saw in the video was Appellant, it is no reason to preclude all testimony about the video, especially given the Commonwealth's announced intention not to ask Detective Lewis that question. As the Court of Appeals found, Detective Lewis had the minimum personal knowledge required by KRE 602.

The Court of Appeals also rejected Appellant's claim that KRE 702 precludes admission of testimony about the contents of the surveillance video. Importantly, it explained "the Commonwealth indicates that it intends to elicit only fact testimony from the detective and not opinion testimony. To the extent the Commonwealth abides by that

representation, any argument Newkirk makes under either KRE 701 or 702 is necessarily impotent." App. Br. A29. The Court went on to explain:

> True, "[d]emarcation between fact and opinion evidence is often obscure, for many times it is difficult to say where fact leaves off and opinion begins." *Morton's Adm'r v. Kentucky-Tennessee Light & Power Co.*, 282 Ky. 174, 138 S.W.2d 345, 347 (1940). Fortunately, our Supreme Court's analysis of lay opinion testimony makes this demarcation between fact and lay opinion testimony less critical.
>
> Under the common law, the rules regarding lay opinion were generally exclusionary in nature. *Arnett v. Dalton*, 257 S.W.2d 585, 586 (Ky. 1953) ("It is the general rule that a witness should confine his testimony to facts within his knowledge and that he should not be allowed to express an opinion."). That is no longer so. KRE 701 "reformulates [pre]Rules lay opinion law] and states the law as an inclusionary rule[.]" Lawson, *supra*, § 6.05[1][b], at 413. As our Supreme Court said:
>
> > The adoption of KRE 701 in this Commonwealth signaled this Court's intention to follow the modern trend clearly favoring admission of such lay opinion evidence. KRE 701 reflects the philosophy of this Court, and most courts in this country, to view KRE 701 as more inclusionary than exclusionary when the lay witness's opinion is rationally based on the perception of the witness and is helpful to the jury or trial court for a clear understanding of the witness's testimony or the determination of a factual issue.
>
> *Hampton v. Commonwealth*, 133 S.W.3d 438, 440-41 (Ky. 2004) (quoting *Clifford v. Commonwealth*, 7 S.W.3d 371, 377 (Ky. 1999) (Johnstone, J., concurring)).
>
> Rather than excluding lay opinion testimony, KRE 701, "read in conjunction with KRE 602," *Mills*, 996 S.W.2d at 488, actually prescribes the conditions which, if met, would allow the detective, or anyone who viewed the videotape before it was destroyed, to express a lay opinion. As the Supreme Court said, if lay witness
>
> > Testimony . . . comprise[s] opinions and inferences that were rationally based on [the witness's] own perceptions of which he had personal knowledge [and if that testimony is] helpful to the jury [such testimony does] not violate the limitations of KRE 701 and KRE 602.
>
> *Id.* at 488-89.

*Morgan v. Commonwealth*, 421 S.W.3d 388 (Ky. 2014), demonstrates how a lay person who has viewed a videotape can express an opinion, based on personal knowledge as required by KRE 602, as to the identity of an individual whose image is captured on that videotape. In that case,

> Three witnesses testified that, although they believed Morgan was the person depicted in the store surveillance video . . . , they were uncertain. . . .
>
> Morgan . . . asserts that the testimony of these three witnesses violated KRE 701 and KRE 602 by invading the province of the jury as the fact finder. . . . [T]hese three witnesses were not present during the robbery. Rather, they were Morgan's acquaintances who were familiar with his appearance at the time of the robbery.
>
> KRE 701 limits opinion testimony by a lay witness to that which is "[r]ationally based on the perception of the witness; [and] . . . [h]elpful to a clear understanding of the witness' testimony or the determination of a fact in issue." KRE 701 (a)-(b). In addition, KRE 602 requires a witness to have personal knowledge before being allowed to testify about a subject. . . . [T]he three witnesses merely identified Morgan as the man present in the surveillance video . . . . We conclude that this testimony was rationally based on the witnesses' personal knowledge from prior exposure to Morgan's physical appearance.

*Morgan*, 421 S.W.3da t 391-92; *see also Stopher v. Commonwealth*, 57 S.W.3d 787, 799-800 (Ky. 2001) (Under "KRE 701, . . . [witness's] observation of Appellant on television rather than in person was not germane to the question of admissibility. She certainly could have expressed the opinion that Appellant looked different that he normally looked."). Isaac would have testified that she believed the person in the videotape resembled Newkirk's brother, with whom she was acquainted. This identification led Detective Lewis to investigate the brothers' whereabouts on the day of the crime which, in turn, let to a second surveillance videotape from the Circle K convenience store. All of this testimony would have aided the jury in understanding how the detective's investigation led to charging Newkirk with a crime.

While no published Kentucky appellate opinion has addressed the permissible scope of opinion testimony regarding the contents of a lost or destroyed videotape, several opinions do address the independent admissibility of testimony—even lay opinion testimony—presented while an available videotape is played for the jury. *See, e.g., Cuzick v. Commonwealth*, 276 S.W.3d 260 (Ky. 2009); *Mills v. Commonwealth*, 996

S.W.2d 473 (Ky. 1999), *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010); *Milburn v. Commonwealth*, 788 S.W.2d 253 (Ky. 1989). Such "simultaneous commentary" was deemed admissible despite the fact that, in part, "it comprised opinions and inferences that were *rationally based on the officer's own perceptions* of which he had personal knowledge . . . ." *Cuzick*, 276 S.W.3d at 265 (quoting *Mills*, 996 S.W.2d at 488 (brackets and internal quotation marks omitted; emphasis added)). As the Supreme Court said,

> The fulcrum of the matter upon which this issue [lay opinion testimony regarding a videotape] turns, is whether the witness has testified from personal knowledge and rational observation of events perceived and whether such information is helpful to the jury. In short, does the testimony comply with the rules of evidence?

*Cuzick*, 276 S.W.3d at 265. "[T]he common thread uniting our decisions on narrative-style testimony of audio and video evidence is that such testimony, like any other, must comport with the rules of evidence." *Id.* That same thread also runs through the decision we make in this case. If a lay witness providing simultaneous commentary may draw inferences and express opinions, there is no reason to exclude the inferences and opinions of a lay witness testifying about a lost or destroyed videotape, as long as the ruling, in all other respects, "comport[s] with the rules of evidence." *Id.* Our reasoning and conclusion parallels that of *State v. Thorne*, 618 S.E.2d 790, 795 (N.C.App. 2005) (officer's opinion testimony "that he had observed defendant's gait [in person and] on the videotape several times, and perceived the two gaits to be similar . . . was not barred by Rule 701").

> We therefore conclude that neither KRE 701 nor 702 will serve as an alternative basis for affirming the circuit court's suppression of this evidence.

App. Br. A30-A34.

The Court of Appeals correctly held that KRE 702 does not prohibit Detective Lewis (or any other individual who viewed the video) from describing what they saw on the video. The witness' testimony will be limited by the fact that it is based on what was viewed on a video recording of the crime. For example, the Detective will not be able to describe any odors that were present at the time the crime was committed. His testimony

likewise will be constrained by the quality of the recording he viewed. For example, as noted in his written summary of what he viewed, the video was not of such quality that details of facial features, scars, or tattoos could be made observed. TR 11CR0462, 47. The Detective's testimony will not be that he was standing in the area watching as the crime occurred. Rather, he will testify that after he was called to the scene, at some point during his investigation, he learned that a surveillance camera recorded the crime. He then viewed that video. Undoubtedly, he will be cross-examined about his failure to collect the video, the unavailability of the video, the quality of the video upon which he bases his testimony, and the length of time that has passed since he viewed the video. KRE 702 does not prevent Detective Lewis from testifying as to what he saw on the video, and the right of cross-examination adequately protects Appellant's ability to defend the case.

Similarly KRE 701 would not prevent Detective Lewis from asserting his belief that the clothes in the unavailable surveillance video appear to be the same clothes worn by one man in the Circle K video. This is not a case where the video is available for the jury to review, and Detective Lewis' testimony would override their ability to evaluate the video for themselves. Appropriately, in cases where a video is avilable, the relevance of the opinion comparing something seen in the video to something else is diminished because of the availability of the actual video and the jury's ability to personally assess the video and draw opinions therefrom. Opinions in those cases, while based on the witness' personal knowledge, may be inadmissible because they are unlikely to "assist the trier of fact to understand the evidence or to determine a fact in issue" since the jury has the ability to view and assess the evidence itself. KRE 701. Thus, if the apartment

surveillance video were available for the jury's own viewing, it might be improper or at least arguably, less relevant, for Detective Lewis to opine whether he believed the clothing in the apartment surveillance video and the Circle K video looked alike because the jury would have the opportunity to compare the two videos. However, because the jury is unable to see the clothing shown on the apartment surveillance video, Detective Lewis' opinion about whether the clothing in the two videos appeared the same—if offered by the Commonwealth—would be helpful to the jury. It would also be subject to attack by cross-examination—"the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970) (internal quotation marks omitted). Of course, this case does not present an ideal situation for the jury who is called upon to make an assessment of the facts. "But the question . . . must be not whether one can somehow imagine the jury in 'a better position,' but whether subsequent cross-examination at the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth . . . . " *Id.* at 161, 90 S.Ct. at 1936. Appellant would be granted an opportunity to cross-examine Detective Lewis regarding the basis of his opinions. The jury would not be required to accept Detective Lewis' opinion, but would be allowed to hear the testimony and judge its credibility based on his possible motives, the passage of time since viewing the video, the unavailability of the video, and any other information gathered by Appellant through cross-examination. Neither KRE 602 nor KRE 701 precludes evidence about what Detective Lewis (or others who viewed the surveillance video) saw on the video.

**IV. "Fairness" does not authorize exclusion of the evidence.**

In his final attempts to convince this Court that the trial court properly excluded evidence of the contents of the unavailable video, Appellant writes:

> As the circuit court correctly concluded, it would not have been equitable to allow testimony about the missing video and what it allegedly revealed when the defendant had never had the opportunity to review that video. As the court further opined, permitting such testimony would open the door to future abuses because the police and the Commonwealth would have no reason to preserve and turn over videos in discovery if witnesses could simply watch a video and then testify about what they purportedly saw. In this case, the police could have taken custody of the video at the time of review rather than leaving it in the apartment complex video system to be recorded over. The Commonwealth and their agents cannot ignore their duty to preserve evidence by simply leaving the evidence in the hands of a third party.

App Br. 26. This plea also fails.

As did the trial court, Appellant contends that if evidence about the contents of the unavailable video is admitted in this case, the Commonwealth will have no incentive to preserve evidence in other cases and will be encouraged to destroy or not collect video recordings in other cases after they are viewed by police. This ruling is insulting, arbitrary, and not based in fact or law. It ignores the Commonwealth's legal and ethical obligations to defendants and the court. It ignores that surveillance videos similar to the one about which the Commonwealth sought to introduce evidence in this case are often the most probative evidence available. It presumes without any reason that the Commonwealth will blatantly violate its ethical duties and destroy evidence in future cases.

> [I]t is the obligation of the prosecuting attorney to conduct himself with due regard to the properties of his office and to see that the legal rights of the accused, as well as those of the Commonwealth, are protected. It is his duty to prosecute but not to persecute. He should endeavor to see that

> justice is meted out and that the accused is dealt with fairly. Above all, there is an obligation that truth and right shall prevail.

*Bowling v. Commonwealth*, 279 S.W.3d 23, 24 (Ky. App. 1955). It was an abuse of discretion for the trial court to exclude the evidence out of an unfounded fear that permitting it in this isolated case under the specific circumstances of this case would result in the mass destruction of video evidence by ruthless prosecutors everywhere.

Moreover, the Court of Appeals properly rejected the idea that some overarching concept of fairness or equity could justify exclusion of evidence that is not excluded—but rather specifically allowed under the rules of evidence. After determining that the trial court's decision to exclude evidence about the contents of the video was based on the trial court's belief that allowing such evidence would be "unfair to the defendant," the Court of Appeals explained why such a feeling alone cannot justify evidentiary decisions.

> Fairness, or rather our understanding of that ambiguous concept, gave birth to the rules of evidence. Every rule of evidence "derives . . . from the concept of fundamental fairness[.]" *Ellis v. Ellis*, 612 S.W.2d 747, 748 (Ky. App. 1980); *Fitzhugh v. Louisville & N.R. Co.*, 300 Ky. 509, 189 S.W.2d 592, 593 (1945) ("All . . . rules . . . are supposed to be founded upon . . . what is fair[.]").
>
> But the relationship between fairness and the evidentiary rules did not end at parturition. Dutiful offspring that they are, evidentiary rules exist to serve the parent. That is why, in addition to deriving from fairness, rules of evidence endure so that fairness remains a viable and real foundation of our justice system; for this purpose alone evidentiary rules are "construed to secure fairness[.]" KRE 102; *see also Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973) ("rules of . . . evidence [are] designed to assure . . . fairness[.]").
>
> However, this close relationship belies the significant differences between the concept of fairness and the rules of evidence. The former is amorphous, general, and subjective; the latter are definite, specific, and objective. These distinguishing characteristics explain why our courts cannot successfully apply the unstructured concept of fairness as an evidentiary rule in and of itself. Our Supreme Court said:

> The rules of evidence have evolved carefully and painstakingly over hundreds of years as the best system for arriving at the truth. They bring to the law its objectivity. Their purpose should be subverted if courts were permitted to disregard them at will because of an *intuitive perception that to do so will produce a better result in the case at hand.*
>
> *Fisher v. Duckworth*, 738 S.W.2d 810, 813 (Ky. 1987) (emphasis added).
>
> This "intuitive perception," as the Court called it, is nothing more than a trial judge's subjective sense of "fairness." Similarly, in the case no under review, the circuit court applied nothing more than its own intuitive perception of fairness to prohibit Detective Lewis's testimony about the missing videotape. That was insufficient in *Fisher v. Duckworth*, *supra*, and it is insufficient in this case.
>
> Without reliance on any specific rule of evidence, a decision to exclude evidence solely on the basis of the judge's subjective sense of fairness is arbitrary and unsupported by sound legal principles, thereby constituting an abuse of discretion.

App. Br. A13-A14. Here, as described in detail above and in the Court of Appeals' opinion, the rules of evidence specifically provide for admission of evidence of the contents of the unavailable video, and it was an abuse of discretion for the trial court to exclude the testimony because it was "unfair."

## CONCLUSION

The Court of Appeals issued a very thorough and well-reasoned opinion fully grounded in the law. This Court should consider adopting that opinion in full or in part. Even if the Court is not inclined to adopt the Court of Appeals' opinion, the Court should **affirm** the Court of Appeals because KRE 1004 specifically provides for introduction of testimony about the contents of the unavailable video in this case, because no other constitutional or statutory provision or rule of evidence precludes it, and because it was an abuse of discretion to exclude all testimony about the contents of the unavailable video.

Respectfully submitted,

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